

No. 12477

United States
Court of Appeals
for the Ninth Circuit.

MARY ZELLMER, as Administratrix of the Estate of Orval Zellmer and MAY ZELLMER, an Individual,

Appellant,

vs.

ACME BREWING CO., a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court
Northern District of California,
Southern Division

FILED
APR 6 1950

PAUL P. O'BRIEN
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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DAN L. GARRETT, JR.,

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Attorneys for Defendant and Appellee.

In the United States District Court for the Northern District of California, Southern Division

No. 29034G

MARY ZELLMER, as Administratrix of the Estate of ORVAL ZELLMER; and MARY ZELLMER, an Individual,

Plaintiff,

vs.

ACME BREWING CO., a Corporation, FIRST DOE, SECOND DOE, THIRD DOE, FIRST DOE COMPANY, SECOND DOE COMPANY, and THIRD DOE COMPANY,

Defendants.

COMPLAINT FOR WRONGFUL DEATH AND BREACH OF WARRANTY

Plaintiff complains of defendants and for her first claim alleges that:

I.

Defendants, First Doe, Second Doe, Third Doe, First Doe Company, Second Doe Company, and Third Doe Company, are sued herein by said names, which are fictitious, for the reason that plaintiff does not know the true names of said defendants, and plaintiff prays leave that when said true names are ascertained, plaintiff may amend this complaint to set forth said true names, together with appropriate charging allegations.

II.

On February 21, 1949, Mary Zellmer was duly appointed Administratrix of the estate of Orval Zellmer, deceased, in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe. Thereafter, and on June 15, 1949, Mary Zellmer duly qualified as such Administratrix and Letters of Administration were duly issued to her on June 15, 1949, by the said Second Judicial District Court of the State of Nevada, in and for the County of Washoe.

III.

At all times mentioned herein, defendant, Acme Brewing Co., was a corporation, organized and existing under and by virtue of the laws of the State of California, and was doing business in the Northern District of California.

IV.

At all times mentioned herein, Mary Zellmer was and now is a resident of the State of Nevada.

V.

From on or about January 18, 1944, Mary Zellmer and Orval Zellmer, her husband, were the owners and operators of the Red Feather Bar and Restaurant, located in the Town of Wadsworth, County of Washoe, State of Nevada.

VI.

On or about October 10, 1947, Mary Zellmer and her husband, the said Orval Zellmer, purchased

twenty-five cases of beer from the Shoshone Coca-Cola Bottling Co. of Reno, Nevada. The said twenty-five cases of beer were manufactured by defendant, Acme Brewing Co., and distributed through and by the said Shoshone Coca-Cola Bottling Co. in Reno, Nevada.

VII.

On or about November 30, 1947, at Wadsworth, County of Washoe, State of Nevada, the said Orval Zellmer opened one of the bottles of Acme Beer from said twenty-five cases of beer, and Mary Zellmer and the said Orval Zellmer each drank part of the contents thereof.

VIII.

After Orval Zellmer and Mary Zellmer drank said beer as aforesaid, they discovered that said bottle contained a dead mouse. The said mouse was present in said bottle due to the careless and negligent manufacture of said beer by defendant, Acme Brewing Co., rendering said beer unfit for human consumption and dangerous and injurious to human life.

IX.

As a direct and proximate result of defendant's negligent and careless manufacture of said bottle of beer, Orval Zellmer became violently ill and thereafter died on or about February 25, 1948, at Wadsworth, County of Washoe, State of Nevada.

X.

As a direct and proximate result of defendant's

negligent and careless manufacture of said bottle of beer, the estate of Orval Zellmer, deceased, became liable for medical and funeral expenses in the amount of \$954.00.

XI.

As a direct and proximate result of defendant's negligence aforesaid, which directly and proximately caused the death of said Orval Zellmer, plaintiff, as Administratrix of the estate of Orval Zellmer, has been damaged generally in the amount of \$120,000.00.

Wherefore, plaintiff prays judgment as hereinafter requested.

And for a Second and Separate Claim, plaintiff alleges that:

I.

Plaintiff repleads and incorporates herein by reference paragraphs I, II, III, IV, V, VI, VII, and VIII of plaintiff's first claim.

II.

The presence of said mouse in said bottle of Acme Beer constituted a breach by defendant, Acme Brewing Co., of an implied warranty of fitness for the purpose for which said beer was sold by defendant, and rendered the said bottle of beer unfit for human consumption and dangerous and injurious to human life.

III.

As a direct and proximate result of defendant's breach of warranty as aforesaid, Orval Zellmer became violently ill and thereafter died on or about February 25, 1948, at Wadsworth, County of Washoe, State of Nevada.

IV.

As a direct and proximate result of defendant's breach of warranty as aforesaid, which directly and proximately caused the death of Orval Zellmer, the estate of Orval Zellmer became liable for medical and funeral expenses in the amount of \$954.00.

V.

As a direct and proximate result of defendant's breach of warranty as aforesaid, which directly and proximately caused the death of said Orval Zellmer, plaintiff, as Administratrix of the estate of Orval Zellmer, has been damaged generally in the amount of \$120,000.00.

Wherefore, plaintiff prays judgment as hereinafter requested.

And for a Third and Separate Claim, plaintiff alleges that:

I.

Plaintiff repleads and incorporates herein by reference paragraphs I, III, IV, V, VI, VII of plaintiff's first claim.

II.

The presence of said mouse in said bottle of

Acme Beer constituted a breach by defendant, Acme Brewing Co., of an implied warranty of fitness for the purpose for which said beer was sold by defendant and rendered the said bottle of beer unfit for human consumption and dangerous and injurious to human life.

III.

As a direct and proximate result of defendant's breach of warranty as aforesaid, plaintiff became violently ill, and suffered severe internal strain and injuries from repeated and prolonged periods of vomiting and was unable to consume normal food for more than one month, and was rendered sick, sore, and disabled and confined to her home for more than three months, and suffered great and irreparable physical damages.

IV.

Plaintiff is informed and believes and therefore alleges upon such information and belief that she has suffered permanent mental damages which will partially incapacitate her from earning her livelihood and will require future medical care and services for many years, and that she has been damaged generally in the amount of \$100,000.00.

Wherefore, plaintiff prays judgment as follows:

1. On her first claim for the sum of \$120,954.00.
2. On her second claim for the sum of \$120,-954.00.
3. On her third claim for the sum of \$100,000.00.

4. For her costs of suit incurred herein, and

5. For such other and further relief as the Court shall deem proper.

/s/ BRUCE WALKUP,

Attorney for Plaintiff.

(Endorsed): Filed Jul. 29, 1949.

[Title of District Court and Cause.]

MOTION TO DISMISS

Defendant, Acme Brewing Co., a corporation, moves the Court to dismiss the complaint herein on the grounds that it appears from the face of the complaint that the cause of action set up in said complaint did not accrue, if it accrued at all, within one year before the bringing of this suit.

Said motion will be based on this written motion, notice of motion, the memorandum of points and authorities filed herewith and upon all of the records, documents and papers on file in the above-entitled action.

Submitted herewith is a draft of the order proposed and requested by said defendant.

Dated: September 22, 1949.

BRONSON, BRONSON &
McKINNON.

/s/ E. D. BRONSON,

/s/ NORMAN A. EISNER,

Attorneys for Defendant, Acme Brewing Co., a Corporation.

NOTICE OF MOTION TO DISMISS

To Plaintiff Above Named and to Messrs. Bruce Walkup and Dan L. Garrett, Jr., Her Attorneys:

You and Each of You Will Please Hereby Take Notice that defendant, Acme Brewing Co., a corporation, will bring the above motion for hearing in the above-entitled Court before the Honorable Louis E. Goodman, on the 3rd day of October, 1949, at the hour of 10:00 o'clock a.m. of said day or as soon thereafter as counsel may be heard at the courtroom of the above-entitled Court, located in the Post Office Building, Seventh and Mission Streets, San Francisco, California.

Dated: September 22, 1949.

BRONSON, BRONSON &
McKINNON.

/s/ E. D. BRONSON,

/s/ NORMAN A. EISNER,

Attorneys for Defendant, Acme Brewing Co., a Corporation.

[Endorsed]: Filed Sept. 23, 1949.

[Title of District Court and Cause.]

ORDER OF DISMISSAL

The motion of defendant, Acme Brewing Co., a corporation, to dismiss the complaint on file herein having come on regularly this day for hearing, and the Court being fully advised and finding that the complaint on file was filed more than one year after the cause of action, if any, accrued to the plaintiff herein,

It Is Hereby Ordered that said complaint be, and it hereby is dismissed.

Dated: October, 1949.

.....,

Judge of the District Court.

[Title of District Court and Cause.]

ORDER GRANTING MOTION TO DISMISS

Defendant's motion to dismiss is granted.

Dated: December 28, 1949.

/s/ LOUIS GOODMAN,
U. S. District Judge.

[Endorsed]: Filed Dec. 28, 1949.

In the United States District Court for the Northern District of California, Southern Division

No. 29034-G

MARY ZELLMER, as Administratrix of the Estate of ORVAL ZELLMER; and MARY ZELLMER, an Individual,

Plaintiff,

vs.

ACME BREWING CO., a Corporation, FIRST DOE, SECOND DOE, THIRD DOE, FIRST DOE COMPANY, SECOND DOE COMPANY, and THIRD DOE COMPANY,

Defendants.

ORDER OF DISMISSAL

Defendant's motion to dismiss having come on regularly for hearing, and this court after oral and written argument by plaintiff and defendant granted defendant's motion to dismiss on December 28, 1949. It is hereby ordered that plaintiff's complaint on file herein, and each cause of action therein, be and the same is hereby dismissed, and the clerk is hereby directed to enter this dismissal of record.

Dated: January 20, 1950.

/s/ LOUIS GOODMAN,
U. S. District Judge.

[Endorsed]: Filed January 23, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Mary Zellmer, as Administratrix of the Estate of Orval Zellmer, and Mary Zellmer, an individual, plaintiffs above named, hereby appeal to the Court of Appeals for the Ninth Circuit from the Order of Dismissal of the above-entitled Court whereby plaintiffs' complaint on file herein and each cause of action therein was ordered dismissed on January 20, 1950. Said order being entered in this action on January 21, 1950.

BRUCE WALKUP,
DAN L. GARRETT, JR.

By /s/ DAN L. GARRETT, JR.,
Attorneys for Appellants.

[Endorsed]: Filed Feb. 1, 1950.

[Title of District Court and Cause.]

NOTICE DESIGNATING CONTENTS OF RECORD ON APPEAL

To the Clerk of the United States District Court
for the Northern District of California, Southern
Division:

You are hereby requested to prepare the record on appeal in the above-entitled action and to include in such record, plaintiff's complaint filed herein on July 29, 1949; defendant's Motion to Dismiss

and Notice of Motion to Dismiss filed herein on or about September 22, 1949; the Order of the above-entitled Court granting defendant's motion to dismiss dated December 28, 1949, and filed herein December 28, 1949; the Order of the above-entitled Court dismissing plaintiff's complaint on file herein, dated January 20, 1950, and filed herein on January 21, 1950; plaintiff's Notice of Appeal filed herein on or about January 31, 1950; plaintiff's Statement of Points Relied on on Appeal and plaintiff's Notice Designating Contents of Record on Appeal.

Dated: February 1, 1950.

BRUCE WALKUP,
DAN L. GARRETT, JR.,

By /s/ DAN L. GARRETT, JR.,
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 3, 1950.

[Title of District Court and Cause.]

STATEMENT OF POINTS RELIED ON
ON APPEAL

Notice is hereby given that plaintiff relies on the following points on appeal in the above-entitled action:

1. Plaintiff's first and second claims are not barred by the statute of limitations contained in

the California Code of Civil Procedure, Section 340, Subsection 3, which prescribes a one-year period within which to file an action for wrongful death.

2. Plaintiff's first and second claims are controlled by the statute of limitations prescribed in Section 5 of Chapter 4 of the Civil Practice Act of 1911, of the State of Nevada for the reason that the said Nevada statute of limitations is substantive in nature and inheres in plaintiff's claims when filed in California.

3. Plaintiff's third claim is not barred by the statute of limitations prescribed by the California Code of Civil Procedure, Section 340, Subsection 3, but is controlled by the statute of limitations prescribed in the California Code of Civil Procedure, Section 339, Subsection 1.

4. If plaintiff's third claim is not controlled by the statute of limitations prescribed in the California Code of Civil Procedure, Section 333, Subsection 1, it is controlled by the statute of limitations prescribed in the California Code of Civil Procedure, Section 343.

BRUCE WALKUP,
DAN L. GARRETT, JR.,

By /s/ DAN L. GARRETT, JR.,
Attorneys for Plaintiff.

[Endorsed]: Filed February 3, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the originals filed in this Court in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the appellant, to wit:

Complaint for Wrongful Death and Breach of Warranty.

Motion to Dismiss and Notice of Motion to Dismiss.

Order Granting Motion to Dismiss.

Order of Dismissal.

Notice of Appeal.

Notice Designating Contents of Record on Appeal.

Statement of Points Relied on on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 7th day of February, A.D. 1950.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12477. United States Court of Appeals for the Ninth Circuit. Mary Zellmer, as Administratrix of the Estate of Orval Zellmer and May Zellmer, an Individual, Appellant, vs. Acme Brewing Co., a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed February 7, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 12477

MARY ZELLMER, as Administratrix of the Es-
tate of ORVAL ZELLMER; and MARY
ZELLMER, an Individual,

Plaintiff,

vs.

ACME BREWING CO., a Corporation, FIRST
DOE, SECOND DOE, THIRD DOE, FIRST
DOE COMPANY, SECOND DOE COM-
PANY, and THIRD DOE COMPANY,

Defendants.

DESIGNATION OF RECORD MATERIAL
TO CONSIDERATION OF APPEAL

Appellant herewith designates the entire record
as material to the consideration of the appeal
herein.

Dated: February 14, 1950.

BRUCE WALKUP,
DAN L. GARRETT, JR.,

By /s/ DAN L. GARRETT, JR.,
Attorneys for Appellant.

[Endorsed]: Filed February 16, 1950.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF POINTS RELIED ON
ON APPEAL

Notice is hereby given that appellant relies on the following points on appeal in the above-entitled action :

1. Appellant's first and second claims are not barred by the statute of limitations contained in the California Code of Civil Procedure, Section 340, Subsection 3, which prescribes a one-year period within which to file an action for wrongful death.

2. Appellant's first and second claims are controlled by the statute of limitations prescribed in Section 5 of Chapter 4 of the Civil Practice Act of 1911, of the State of Nevada for the reason that the said Nevada statute of limitations is substantive in nature and inheres in appellant's claims when filed in California.

3. Appellant's third claim is not barred by the statute limitations prescribed by the California Code of Civil Procedure, Section 340, Subsection 3, but is controlled by the statute of limitations prescribed in the California Code of Civil Procedure, Section 339, Subsection 1.

4. If appellant's third claim is not controlled by the statute of limitations prescribed in the California Code of Civil Procedure, Section 333, Sub-

section 1, it is controlled by the statute of limitations prescribed in the California Code of Civil Procedure, Section 343.

Dated: February 14, 1950.

BRUCE WALKUP,

DAN L. GARRETT, JR.,

By /s/ DAN L. GARRETT, JR.,

Attorneys for Appellant.

[Endorsed]: Filed February 16, 1950.

Affidavits of Service by Mail attached.

